No. 95-163

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

Supreme Court, U.S.
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ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA,

Petitioners,

V.

ALFRED DEBLASIO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must the Supreme Court exercise its jurisdictional powers to decide legal issues in a case where no controversy exists.

2. Whether land ownership is a property interest worthy of substantive due process protection.

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v.

ALFRED J. DEBLASIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, **ALFRED J. DEBLASIO**, respectfully requests that this Court deny the Petition for Writ of Certiorari

submitted by the above-named Petitioners referred to collectively as the ZBA Defendants.

OPINIONS OF THE COURTS BELOW

This case was commenced on February 28, 1992, by Respondent, Alfred J. DeBlasio, in the United States District Court for the District of New Jersey pursuant to 42 U.S.C. 1983 and 1985 when the ZBA Defendants deprived Respondent of his right to due process and freedom from government confiscation of his property. On May 6, 1993, the District Court granted the ZBA Defendants' motion for summary judgment dismissing all counts of Respondent's complaint. The Opinion and Order of the District Court is reported at 820 F. Supp. 876, and reprinted at 36a-53a in the Appendix to the ZBA defendants' Petition for Writ of Certiorari.

On May 1, 1995, the Court of Appeals for the Third Circuit entered a judgment and opinion which reversed the District Court's dismissal of Respondent's due process claim. The opinion of the Court of Appeals for the Third Circuit, dated May 1, 1995, is reported at 53 F.3d 592. The opinion is reprinted in the Petitioners' Appendix at pp. 1a-33a. On May 30, 1995, the Court of Appeals denied Petitioners' Petition for Rehearing with Suggestion for Rehearing In Banc by a vote of 9-5. The Order denying the Petition for Rehearing and refusing the Suggestion for Rehearing In Banc is unreported, and reprinted at 54a-55a of Petitioners' Appendix.

STATUTORY PROVISIONS

The statute at issue is 42 U.S.C. 1983.

STATEMENT OF THE CASE

In 1974, Respondent, Alfred J. DeBlasio, and his wife, Dolores, purchased a one acre parcel of land in rural West Amwell Township, New Jersey. At the time of the purchase by Respondent and his wife, there was a World War II surplus quonset hut on the property, which had been used by the prior owners as an auto body repair shop. 4a. The use of Respondent's property as an auto body repair shop extends back to the 1950s. Then, the property was owned by one Earl Brown who operated an auto body repair shop on the property. In about 1964, the Township of West Amwell enacted its first zoning ordinance. The zoning ordinance designated Respondent's property R-3, representing 3-acre minimum residential use. The ordinance did not permit a commercial operation, such as Brown's auto body repair shop, to be conducted on the property. However, New Jersey's Municipal Land Use Act, *N.J.S.A.* 40:55D-70 (d), permitted the continued commercial use of the property as a pre-existing, non-conforming use exception to zoning restrictions. 4a.

On October 18, 1966, Earl Brown sold the property to George Guidotti. As did Brown, Guidotti operated an auto body repair shop on the property, and in 1967, a neighbor complained that Guidotti's operations were an impermissible

expansion of the pre-existing, non-conforming use established by Brown. On May 30, 1967, a hearing was held before the West Amwell Township Zoning Board of Adjustment on the complaint. In that hearing, the zoning board of adjustment determined that Guidotti had neither abandoned nor expanded Brown's pre-existing, non-conforming use and that Guidotti's commercial operations were legal. 4a.

However, the Petitioners argued throughout the course of this litigation that a "second resolution" was adopted by the West Amwell Township Zoning Board of Adjustment on July 12, 1967. Petitioners argued that this so-called "second resolution" contained specific, detailed restrictions against specific commercial activity on Respondent's property. The mysterious "second resolution" was never found or produced by Petitioners. In deed, despite the alleged existence of this so-called "second resolution", and its attempted enforcement by the ZBA Defendants to deny Respondent the continued commercial use of his property, the ZBA Defendants readily acknowledged, as early as February, 1989, that the mysterious resolution had never been adopted, and, in fact, it never existed.

Beginning in 1979, and continuing to the present, Respondent leased the property to Interstate Battery, a wholesale battery distribution business owned by Peter Holmes. 4a. For nearly eleven (11) years, from 1979 to 1989, Interstate Battery operated a wholesale battery distribution warehouse on the

Respondent's property without even the slightest indication that its operations violated the pre-existing, non-conforming use permitted on the Respondent's property. Suddenly and unexpectedly, members of the West Amwell Zoning Board of Adjustment, Respondent's neighbors, and Township Officials embarked upon a campaign to rid the Respondent's property of Interstate Battery. This campaign included a petition drive, complaints to the zoning official, Eugene Venettone, and complaints to various municipal and state officials, including the mayor, the township attorney, the board of health, the environmental authorities and the police.

During the height of the campaign to oust Interstate Battery from the Respondent's property, Werner J. Hoff, a 30 year member of the West Amwell Zoning Board of Adjustment, approached Peter Holmes, the owner of Interstate Battery. 5a. Hoff sought to convince Holmes to vacate Respondent's property and move Interstate Battery's operations to the Hoff family's competing commercial property, equipped with a similar quonset hut. Hoff's competing commercial property was located just a few miles from the Respondent's property. The Hoff property was available for lease, having been left vacant by the demise of John W. Hoff's excavation business which had failed in or about 1988 or 1989. 5a.

Additionally, John Hoff's business failures resulted in severe financial losses to the Hoffs which exceeded $272,000.00, and agreements among

Petitioner, Werner J. Hoff, and his sons to clear the property of creditor liens. Hoff and his elder son, Dr. Werner E. Hoff, agreed to supply $272,000.00 to liquidate the debts that the younger son, John, had accumulated as the result of the failure of his excavation business. The Hoffs' agreement to provide funding for the debts of the younger son was memorialized in a Mortgage and Security Agreement dated February 7, 1989.

After 15 continuous years of uninterrupted commercial use and enjoyment of his property, Respondent's zoning problems began at precisely the same time that the Hoffs began to settle their financial obligations relating to their property. For example, the day after the Hoff family entered into their February 7, 1989, mortgage and security agreements, official action was taken against Respondent to remove Interstate Battery as Respondent's tenant. On February 8, 1989, Zoning Officer, Eugene Venettone, issued the first notice of zoning violation to Respondent. The notice of violation claimed that a storage trailer that had long been kept on Respondent's property constituted a zoning violation.

Within two weeks after the first notice of violation had been issued to Respondent, James and Virginia Lavan, on February 23, 1989, wrote directly to Petitioner, Werner J. Hoff, to enlist his aid in ousting Interstate Battery from the Respondent's property. 6a. Coincidentally, the Lavans were the in-laws of ZBA defendant, Robert Fulper, Jr.

One week later, on March 1, 1989, Philip Faherty, the West Amwell Township Attorney, wrote to Venettone demanding that Venettone issue a second notice of violation to Respondent, this time declaring that the entire operation of Interstate Battery was "in violation of the Township zoning ordinance". Faherty sent a copy of the letter to Hoff. These letters, combined with Hoffs' contemporaneous financial problems related to the competing commercial property, raised material issues of fact as to the existence of a conspiracy to misuse government power by issuing the first notice of violation and by taking subsequent zoning actions against Respondent.

When Venettone refused to issue a second notice of violation in response to Faherty's March 1, 1989, letter, Faherty wrote directly to Respondent's tenant, Peter Holmes, on March 29, 1989. Faherty's letter threatened Holmes with legal action if he did not cease his operations. Again, Faherty provided Hoff with a copy of the letter. However, Faherty failed to inform Holmes that neither Faherty nor any other township official had any authority to take legal action unless the zoning official, Venettone, issued a notice of violation. Thus, Faherty's March 29, 1989, letter to Holmes was a patently improper attempt to oust Interstate Battery from the Respondent's property.

Respondent vigorously disagrees with the dissenting opinion's view that "no reasonable jury could find that a

conspiracy existed within the ZBA to deprive DeBlasio of substantive due process". 32a. The coincidence between the Hoff family's financial woes, Hoff's pressure to force Holmes from the Respondent's property, the fierce campaign of the Lavans to oust Holmes from the Respondent's property after more than 10 years of peaceful co-existence, the improper actions of the township attorney attempting to rid the Respondent's property of Interstate Battery, the first notice of violation issued on February 8, 1989, the day after the Hoffs executed their family agreements to bail out John Hoff's failed business, and an attempt to issue a second notice of violation, all within an extremely brief period of time, effectively eliminates chance as an explanation for these occurrences. Each of these actions was undertaken by different persons, each was solely directed at ousting Interstate Battery from Respondent's property and together the evidence provides ample proof of a conspiracy to deprive Respondent of the continued commercial use of his property through a misuse of governmental power.

On May 22, 1990, Respondent appeared before the Zoning Board of Adjustment, applying for a clarification of the status of his property. Hoff immediately recused himself from any proceedings involving the Respondent's property, as did Robert Fulper, Jr., another member of the zoning board of adjustment. Hoff did not explain his recusal. Fulper recused himself because he was married to the Lavans' daughter. Despite the recusal of

Hoff and Fulper, both of them remained in the hearing room in violation of the West Amwell zoning ordinance. Hoff continued to act as secretary to the zoning board of adjustment and fully participated in the proceedings during the hearing.

In the May 22, 1990, hearing before the zoning board of adjustment, the members quickly determined that the board had no jurisdiction to "clarify" the status of the property, as there was no outstanding notice of violation. However, despite its lack of jurisdiction, the board scheduled a second hearing and subpoenaed Venettone to appear and explain why there was no notice of violation. Thus, instead of concluding the Respondent's case before the board, it continued.

On June 26, 1990, the zoning board of adjustment conducted another hearing regarding Respondent's property. Venettone appeared and was asked whether he had cited Respondent for a zoning violation to which Venettone responded that he had not. Respondent then withdrew his application for clarification, as no issue remained before the board. Again, this should have ended the matter. However, between the June 26, 1990, zoning board hearing and August 7, 1990, Hoff met privately with Venettone and pressured Venettone into issuing a second notice of violation to Respondent. On August 7, 1990, Venettone issued a second notice of violation to respondent claiming that "violations exist in contravention of the Zoning Ordinance of West Amwell Township

in that: Expansion of a pre-existing, non-conforming use..... in violation of Resolution adopted July 12, 1967". Of course, as stated previously, no such 1967 Resolution ever existed.

The second notice of violation gave no description of the violations that Venettone allegedly found. On August 30, 1990, the zoning board of adjustment deemed this notice of violation sufficient to give it jurisdiction over Respondent. From that point on, Respondent faced a zoning board of adjustment that included Hoff as a full participant, as Hoff no longer pretended to recuse himself. Hoff offered no explanation of why he was ignoring his prior recusal. More remarkably, Hoff's participation in the Respondent's hearings before the zoning board of adjustment was not questioned by the board's attorney or by its chairman or by any other member of the zoning board of adjustment.

The second notice of violation issued by Venettone expressly relied upon a purported "Resolution" dated July 12, 1967, as the basis for the alleged zoning violation. However, since no resolution dated July 12, 1967, or any other date, ever existed which contained restrictions on the use of Respondent's property, Venettone and the board members took the legally untenable position that a proposed resolution, discussed in the minutes of a May, 1967 zoning board meeting was binding law. Consequently, Respondent's commercial use of his land was declared illegal, based solely upon a

24 year old proposal that had never been enacted, adopted or even existed.

At the time that Venettone issued the second notice of violation to Respondent on August 7, 1990, Hoff's need for a tenant had intensified. Hoff's property had laid vacant for at least 18 months since the February 7, 1989, $272,000.00 Mortgage and Security Agreement was executed by Hoff and his children. The monthly expenses of over $2,000.00 per month continued to be incurred by the Hoffs.

Faced with the loss of the continued commercial use of his property, Respondent was forced to appeal Venettone's August 7, 1990, notice of violation and, in the alternative, apply for a variance that would permit the continuation of Interstate Battery's operation. Respondent was opposed by Hoff at every turn. When Respondent's appeal of Venettone's August 7, 1990, notice of violation came to a final vote on October 23, 1990, Hoff did not abstain, even though he and his son, Dr. Werner E. Hoff, still held a $272,000.00 mortgage on the Hoffs' competing commercial property, the Hoffs still held title to the property, Hoff was managing the property and the property remained vacant. Instead, Hoff voted against Respondent's appeal from the second notice of violation.

Prior to the zoning board of adjustment's vote on the appeal of the August 7, 1990, notice of violation, the board of adjustment attorney, Palilonis,

specifically instructed the board members that their "obligation" in the hearings was to determine whether the present use of the Respondent's property by Interstate Battery was "more intense" than the prior use.

On November 27, 1990, the Board issued a resolution that declared Interstate Battery's use of the Respondent's property illegal, but failed to contain a finding that the intensity of Interstate Battery's use was greater than the intensity of the prior use. The zoning board of adjustment, ignoring Palilonis' instructions that intensity of use was determinative in the appeal, relied instead upon the descriptions of operations in the hand-written minutes of the May 30, 1967 board hearings. The board erroneously considered the descriptions in the May 30, 1967, minutes to be legally binding restrictions which could not be exceeded by Respondent on the property. These descriptions related to the prior owner, Earl Brown's hours of operation, days of operations, number of employees, and the availability of the grounds for business operations. However, these descriptions of operations were never converted into legally binding limitations on the property and have never been found in any zoning board of adjustment enactment or resolution.

Not content to merely vote against Respondent's appeal, Hoff took an active role in the drafting of the November 27, 1990, resolution, which was indisputably the responsibility of the board attorney, Palilonis, not Hoff. In the November 27,

1990, zoning board meeting, Hoff criticized the resolution drafted by Palilonis because it was not strong enough. Hoff also made a motion to amend Palilonis' draft resolution to contain specific language that Interstate Battery did expand and exceed pre-existing, non-conforming use. Hoff then voted in favor of his own motion which was passed.

Following the November 27, 1990, hearing, wherein the board rejected Respondent's appeal of the August 7, 1990, notice of violation, Respondent's variance hearing began. As expected, Hoff led the opposition. Hoff read into the record a letter from the Lavan's counsel, which stated that "Interstate Battery should cease and desist" operations on the Respondent's property immediately. Hoff also expressed his personal criticism of Respondent's attorneys, and stated that the zoning board of adjustment "has been hampered by the methods used to present this case." Hoff also took upon himself the opportunity, on behalf of the board, to cross-examine Holmes, who Hoff previously solicited to become a tenant for his property. During Hoff's cross-examination of Holmes, Hoff volunteered that he had difficulty in determining if the Respondent's property could support the use as described by Holmes. Hoff also offered his opinion that he was "concerned" that the Respondent's Property did not "have enough area to conduct business as described." Hoff then recorded his own negative comments in the official minutes.

On March 26, 1991, and April 23, 1991, Respondent presented expert witnesses who testified concerning noise levels and site planning. The noise level expert testified that the noise levels from the property were so low that more noise was created by passing traffic. The site planner testified that Interstate Battery's use was less intense than the prior owner's use and suggested methods of site alteration which would further minimize the intensity of the operation. The testimony of Respondent's experts was uncontroverted. No evidence disputing any of their findings was ever presented by the zoning board of adjustment.

On May 28, 1991, Hoff made a motion to have the zoning board of adjustment deny the respondent's variance application. Hoff moved to deny Respondent's variance even though the uncontroverted evidence proffered by Respondent at the two variance hearings unequivocally proved that the use of Respondent's property by Interstate Battery was less intense than that of the prior owners. A majority of seven voting board members was required to pass this motion. Hoff's motion to deny the Respondent's variance application was carried on a 4 to 3 vote with Hoff casting the deciding vote.

REASONS TO DENY THE WRIT

I. Whether the Property Interest Standard for Maintaining a Substantive Due Process Claim is Mere Ownership or Legitimate Claim of Entitlement, Respondent's Protected Property Interest Satisfies Either Standard. Therefore, No Controversy Exists for the Supreme Court to Decide in This Case.

Before reaching the merits of a party's substantive due process claim, Courts are required to first determine whether the property rights asserted by the party claiming deprivation could have constituted protected property interests within the meaning of the fourteenth amendment. In the context of a zoning dispute, to state a claim under the fourteenth amendment for deprivation of property without due process of law a person must establish that he had a valid property interest in some benefit that was protectible under the fourteenth amendment at the time that he was deprived of the benefit. *Board of Regents* v. *Roth*, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed. 548 (1972); *G.T. Scott* v. *Greenville County*, 716 F.2d 1409, 1418 (4th Cir. 1983).

In *Roth*, the Supreme Court noted that to determine whether a property interest in some benefit rises to the level of a right protectible under the fourteenth amendment, courts therefore must look to "existing rules or

understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577, 92 S.Ct. at 2709.

Under New Jersey state and local law, Respondent, Alfred J. DeBlasio, possessed fourteenth amendment protected interests in the zoning variance which he was forced, by the ZBA defendants, to apply for, and in the general commercial use of his property which, pursuant to *N.J.S.A.* 40:55D-70 (d), permitted Respondent to enjoy the continued commercial use of the property as a pre-existing, non-conforming use exception to the state zoning restrictions. Therefore, because Respondent's property was zoned and used commercially at the time that his dispute with the ZBA Defendants arose, Respondent had protectible fourteenth amendment property rights in the commercial use of his property. Further, there was sufficient evidence presented below that a jury could reasonably find that the Respondent had been deprived of those benefits in violation of the fourteenth amendment.

In the present case, it simply makes no difference whether the property interest standard for maintaining a substantive due process claim under the fourteenth amendment is "mere ownership" of the property or whether, as Petitioners argue, the correct standard is legitimate claim of entitlement. In either case, Respondent meets the standard. Therefore, as a matter of law,

Respondent has a protected property right and is entitled to maintain a substantive due process claim regardless of which standard applies. Consequently, the issue raised by Petitioners' Writ simply has no bearing on the outcome of this case.

While Petitioners are quick to argue the apparent "remarkable" conflict among the various federal appellate courts, they fail to address the more critical question of whether the Respondent, in the present case, would have fared any differently had the majority in the Third Circuit applied the legitimate claim of entitlement standard. While dwelling on the so-called "conflict", Petitioners offer no guidance on what the legitimate claim of entitlement standard entails, nor whether the Respondent's fourteenth amendment claim would have been dismissed had a standard different than mere ownership been applied by the Third Circuit. In deed, even if, as Petitioners argue, there is a conflict among the federal appellate courts, the resolution of that issue by the Supreme Court will not effect the outcome of the present case.

The Second Circuit in *Yale Auto Parts, Inc.* v. *Johnson*, 758 F.2d 54 (2d Cir. 1985), a case involving a Connecticut zoning dispute, stated that "the question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate for fourteenth amendment purposes should depend on whether, absent the alleged denial of due process, there is either a

certainty or a very strong likelihood that the application would have been granted." *Id* at 59.

Applying the *Yale Auto Parts* test, if the Respondent's property was zoned and used commercially, as it had been since the 1950s when owned by Earl Brown, Respondent very likely would have been entitled to the benefit of the commercial use of his property *but for* the alleged improper conduct of the ZBA Defendants. It was an undisputed proven fact below that the commercial use of the Respondent's property by Interstate Battery was a less intense use than that conducted by the prior owners, Brown and Guidotti. Having proven that crucial fact by uncontroverted evidence, Respondent was *entitled* to have his variance application granted by the ZBA defendants, and to be permitted to continue the commercial use of his property with Interstate Battery as his tenant. Under New Jersey law, the ZBA defendants had no discretionary authority to interfere with the Respondent's right to lease his property to Interstate Battery once Respondent proved that he was entitled to the zoning variance. Nor did the ZBA Defendants have the right to force Respondent to apply for a variance to save his property from the loss of its commercial use. Respondent's variance application was precipitated in response to a notice of violation which cited Respondent for allegedly violating a 1967 "resolution" which never existed.

Respondent's property complied with the applicable state and municipal

requirements for its continued commercial use. In two hearings before the ZBA Defendants on March 26, 1991 and April 23, 1991, Respondent presented expert testimony concerning noise levels and site planning. These experts testified that the noise levels from the property were so low that more noise was created by passing traffic. The site planner testified that Interstate Battery's use was less intense than that of the prior owners. This expert testimony was uncontroverted. Consequently, there was no element of discretion of judgment remaining for the ZBA Defendants to exercise in determining whether to grant or deny Respondent's variance. Having satisfied the burden of proof imposed by the local zoning ordinance to prevail on his application for a variance, the ZBA Defendants, led by self-interested Werner J. Hoff, denied the Respondent's variance application by a 4 to 3 vote with Hoff casting the deciding vote.

The ZBA Defendants improperly determined that Interstate Battery's use of the Respondent's property was an expansion of the pre-existing, non-conforming use when there was not one shred of evidence proving that the continued commercial use of Respondent's property by Interstate Battery was more intense than the use of the property by the prior owners. In deed, all of the evidence was to the contrary. Hence, the Petitioners' improper conduct, motivated by Hoff's personal and political reasons, subjected Respondent to various approval processes solely to prevent Interstate Battery from continuing to occupy and use

Respondent's property. It must therefore be concluded that even under the *Roth* standard of legitimate claim of entitlement, Respondent had a protectible property interest under the fourteenth amendment.

There is no doubt that had the ZBA Defendants not been motivated by purely personal and political reasons, it was a certainty or, at the very least, a very strong likelihood that Respondent's variance application would have been granted. Stated differently, but for the improper conduct of the ZBA defendants, Respondent's variance application was certain to have been granted. The Municipal Land Use Act of the State of New Jersey, *N.J.S.A.* 40:55D-70(d), entitled Respondent to enjoy the continued commercial use of his property under the pre-existing, non-conforming use exception to the state zoning restrictions.

Nevertheless, despite its conformity with state law, the ZBA Defendants sought to restrict Respondents' use of the property by issuing a notice of violation on August 7, 1990, declaring that the use of Respondent's property was "in violation of Resolution adopted July 12, 1967." A Resolution dated July 12, 1967, restricting the use of Respondent's property, never existed, and one was never produced in the litigation. Accordingly, where property complies with applicable state and municipal requirements, there is no discretion or judgment remaining for the ZBA defendants to exercise in determining whether or not

to grant Respondent's variance application. *See Sullivan* v. *Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986). *See also*, Bello v. *Walker*, 840 F 2d 1124, 1129-1130 (3rd Cir. 1988) in which the Third Circuit reversed a grant of summary judgment rendered in favor of a municipal zoning board where the plaintiff presented sufficient evidence to demonstrate that the municipal council's denial of a building permit was motivated by purely personal and political reasons.

Despite its adherence to the entitlement inquiry in land use regulation cases, the Second Circuit has not hesitated, when possible, to criticize its application. In *RRI Realty Corp.* v. *Inc. Village of Southhampton*, 870 F. 2d 911 (2d Cir. 1989), the Court expressed its own dissatisfaction with the entitlement inquiry by stating at p. 917 that,

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for---whether a zoning variance, a business license, or a building permit--- instead of simply recognizing the owner's indisputable property interest in the land he owns and asking whether local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the

> application arbitrarily and capriciously. As Justice Stevens has observed, "the opportunity to apply for [a zoning amendment] is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment." Citing, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 683, 96 S.Ct. 2358, 2366, 49 L.Ed.2d 132 (1976). Indeed, the entitlement inquiry will not often aid the analysis in this context.

In deed, the only justification offered by the Second Circuit in *RRI Realty Corp.* for applying the entitlement test to land use cases in the Second Circuit is its concern that if the entitlement test is not applied with considerable rigor, that federal courts will become "zoning boards of appeals". *Id.* at 918. However, this concern was disspelled by Judge Lewis, who delivered the opinion for the majority below, when he stated that

> We do not share the dissent's legitimate concern that this standard "will invite the land owner into any federal court to challenge even the most mundane and routine zoning decisions." Dis. Op. Typescript at 26. The standard we articulate today is implicit in *Bello*, and *Bello* has not overburdened the federal courts by inviting meritless landowner suits. Moreover, we note by way of analogy that

> persons denied licenses required for the practice of certain occupations are not required to demonstrate entitlement to the license sought in order to state a substantive due process claim. To state a substantive due process claim, such persons need only assert that the license sought was arbitrarily denied. *See RRI Realty Corp.*, 870 F.2d at 917-18 n.4 (citing *Wilkerson* v. *Johnson*, 699 F.2d 325 (6th Cir. 1983). This rule has not invited abuse of the federal courts by persons denied licenses to pursue particular occupations.

Appendix at 17a-18a.

In *Brady* v. *Town of Colchester*, 863 F.2d 205 (2d Cir. 1988), the Second Circuit, while paying lip service to the entitlement test enunciated in *Roth* and *Yale Auto Parts*, found the requisite protectible property interest to be an aspect of the rights enjoyed by the plaintiff as owner of his property. And, in the majority opinion below, the Third Circuit agreed with the observation of the Court of Appeals for the Second Circuit: in *Roth*, the Court announced that a property interest within the meaning of the Fourteenth Amendment "includes not only what is owned but also, in some limited circumstances, what is sought." *RRI Realty Corp.* v. *Inc. Village of Southampton*, 870 F.2d 911, 915 (2d Cir. 1989) (citing *Roth*, 408 U.S. at 577).

The legitimate claim of entitlement test is fundamentally unfair and inequitable. It shackles a landowner with the added burden, when asserting a substantive due process claim, of proving entitlement to a variance, permit or license by a certainty or a very strong likelihood, when persons who are denied occupational licenses need only show that their license application was arbitrarily denied to state a claim. *See Wilkerson* v. *Johnson*, 699 F.2d 325 (6th Cir. 1983). *See also, RRI Realty Corp.* at 917-18. Conceivably, a person, like Respondent in the present case, who derives income from the commercial use of his land could be deprived of asserting a substantive due process claim even though local land use regulators acted arbitrarily, when an applicant for an occupational license might not face the same obstacle. Focusing on the authority of the local regulator thereby permits the threshold rejection of some federal due process claims, without awaiting exploration of whether the regulator acted so arbitrarily as to offend substantive due process in the particular case. Accordingly, the legitimate claim of entitlement standard is an unfair test to impose upon a landowner seeking to vindicate his constitutional rights through the maintenance of a fourteenth amendment claim.

II. There Was Either a Certainty or Very Strong Likelihood That Respondent's Variance Application Would Have Been Granted. Therefore, Under the Legitimate Claim of Entitlement Standard Respondent is Entitled To Maintain His Fourteenth Amendment Claim.

The legitimate claim of entitlement test depends on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted. *Yale Auto Parts, Inc.*, 758 F.2d at 59. This standard was intended to be a tool capable of measuring particular applications to determine if the applicant had a legitimate claim of entitlement based upon the likelihood that without the due process violation that application would have been granted. *Sullivan*, 805 F.2d at 85.

In denying Respondent's application for a variance, which would have permitted the continued commercial use of Respondent's property by Interstate Battery, the ZBA Defendants offered no reason why Respondent's application had been denied. Nor did the ZBA Defendants follow the instructions set down by the ZBA attorney, Palilonis, who instructed the zoning board members that in considering and deciding the Respondent's variance application, the board must find that the use was more or less intense than that of the prior owners. The board made no such findings as the

uncontroverted evidence proffered by the Respondent and his experts proved that the use of Respondent's property by Interstate Battery was a less intense use. Therefore, there was no lawful basis for refusing to grant the Respondent's variance application on any ground, and, in deed, no ground for denying it was stated. It is clear from the well-developed facts of this case that *but for* the improper conduct of the ZBA Defendants, Respondent's variance application conformed in all respects to the requirements for a variance, and that Respondent was thus entitled to it.

The impermissible denial of Respondent's variance application came out of thin air. It was not derived from any existing legislation or administrative standard such as the West Amwell Township zoning ordinance, nor was the denial supported by any evidence in the record. In deed, as previously stated, Respondent's evidence which proved that the use of his property by Interstate Battery was less intensive than that of the prior owners was uncontroverted. It is clear that the ZBA defendants did not have the authority to act as it did under New Jersey law in denying Respondent's variance application. Given this, Respondent has satisfied the *Yale Auto Parts* test by proving that he has a protectible fourteenth amendment property interest. Furthermore, where, as here, the government's discretion is limited by law and the government acts outside that limitation, or where the government's articulated reason for denying the

benefit is without basis in law, and no other lawful impediment to granting the application exists, then a plaintiff may assert an entitlement sufficient to support a constitutional claim.

III. Where a Landowner's Constitutional Rights Are Infringed By Local Zoning Actions, It Is Clear That Federal Courts Are Duty Bound To Protect The Landowner's Constitutional Interest.

The ZBA Defendants had no authority under state or local law to deny Respondent's application for a zoning variance or to force Respondent to apply for a variance when the ZBA Defendants arbitrarily and capriously sought to enforce a non-existent resolution to eliminate the commercial use of Respondent's property. By subjecting Respondent to the overall approval process in circumstances where the underlying motivates for doing so were purely personal and politically motivated, one must conclude that there was no rational basis for the ZBA Defendants' actions, and that as a result, the ZBA Defendants violated Respondent's rights to substantive due process. In zoning dispute cases, the principle of substantive due process assures property owners of the right to be free from arbitrary, capricious and irrational zoning actions. *See Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). When a landowner's

constitutional rights are infringed by local zoning actions, it is clear that the duty of the federal courts is to protect the constitutional interest of the landowner. *Sullivan v. Town of Salem*, 805 F.2d at 82.

In the facts of this case, the decision of the Third Circuit Court of Appeals to reverse and reinstate Respondent's substantive due process claim would not have been any different regardless of whether the Court applied the legitimate claim of entitlement or mere ownership standard. Where, as here, no controversy exists, this court should, as it must, deny review.

CONCLUSION

For the foregoing reasons, Petitioners' request for a writ of Certiorari should be denied.

Respectfully Submitted,

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